

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 27-2006:

MONTANA PUBLIC EMPLOYEES)	Case No. 2499-2006
ASSOCIATION,)	
)	
Complainant,)		FINDINGS OF FACT;
)	CONCLUSIONS OF LAW;
vs.)	AND RECOMMENDED ORDER
)	
FERGUS COUNTY COMMISSION,)	
)	
Defendant.)	

* * * * *

I. INTRODUCTION

On June 22, 2006, Complainant Montana Public Employees Association (MPEA) brought this charge alleging that Respondent Fergus County Commission's refusal to honor the result of a grievance filed by Lt. Troy Eades constituted an unfair labor practice in violation of Montana Code Annotated § 39-31-401(1) and (3).

Prior to hearing, the respondent filed a motion for summary judgment urging ostensibly the same bases for decision that it urged at the hearing. The complainant opposed the motion, arguing that there were material issues of fact and law. The hearing officer denied the motion based on the claimant's arguments.

Hearing Officer Gregory L. Hanchett convened a contested case hearing in this proceeding on April 25, 2007 in Lewistown, Montana. Carter Picotte, Attorney at Law, represented MPEA. Robert Brown, Attorney at Law, represented the Fergus County Commission. Fergus County Sheriff Thomas Killham, Fergus County Undersheriff Rick Vaughn, Vicki Eades, MPEA representative Richard Letang, Fergus County Commissioner Jon Jensen, and Fergus County Clerk and Recorder Kathy Fleharty all testified under oath. The parties stipulated to the admission of Joint Exhibits A, B, C, D, E, F, G, I, J, M, N, O, P, Q, R and T. In addition, Exhibits H, K, L, S, U and V were admitted. Following the hearing, the parties timely submitted post-hearing briefs and the record closed. Based on the evidence and argument adduced at hearing and in the post-hearing briefs, the hearing officer makes the following findings of fact, conclusions of law, and recommended order.

II. ISSUE

Did the Fergus County Commission commit an unfair labor practice when it refused to honor the result of the Fergus County undersheriff's grievance determination which sustained Eades' grievance?

III. FINDINGS OF FACT

1. At all times pertinent to this case, the Fergus County Commission was a public employer within the meaning of Montana Code Annotated § 39-31-103(10). Fergus County employed Lt. Troy Eades as a deputy county sheriff. Lt. Eades was at all times pertinent to this case a member of the Montana Public Employees Association (MPEA), the recognized representative of the bargaining unit to which Eades belonged.

2. On March 22, 2006, Lt. Eades wrote a letter to the Fergus County Commissioners in which he stated that he wished to "formally submit a request for a one year's leave of absence" to begin on April 15, 2006. Exhibit D. The purpose of the leave was to "participate in an international police mission in Kabul, Afghanistan" in order to "gain some financial stability" and also to "gain valuable knowledge of how police work is done in other regions of the world." In the position, he would work for a private security company. The request for leave was not related to any military deployment.

3. Lt. Eades delivered a copy of his letter to the Fergus County Clerk and Recorder on March 22, 2006. The clerk immediately provided the letter to the county commissioners.

4. At the time of Eades' request, Fergus County had an existing collective bargaining agreement (CBA) with MPEA. Article IV, Section 1 of the CBA reserves to the county "the responsibility and authority to manage and direct . . . all of the operations and activities of the county to the full extent authorized by law." That section of the article also reserves to the county "all management rights, functions and prerogatives not expressly delegated in this agreement." Section 2 of that article reserves to the county the power to direct employees, maintain efficiency of government operations, determine methods and means by which agency operations are to be conducted, and to establish the methods and processes by which work is to be performed. Section 3 of that article further recognizes that the parties adopt by reference the Fergus County Policy Manual in effect as of January 1, 1997 and further recognizes that where there is a conflict between the manual and the CBA, the CBA will prevail.

5. Article VIII of the CBA provides the grievance procedure to be utilized by an aggrieved union member. Section 2 of that Article provides that the failure of the grievant or association to act on a grievance within prescribe time limits acts as a bar to any further appeal. Section 4 defines a grievance as "an alleged violation, misinterpretation, or misapplication of any provision of this agreement." Sections 5 and 6 of the article, when read in conjunction, require an employee to make a written grievance to the undersheriff within ten working days of the event giving rise to the grievance, or of the time the employee could reasonably expect to have knowledge of the event.

6. Article IX of the CBA relates to leaves to which a bargaining unit member is entitled. Pertinent to the inquiry in this case is Section 6 of that article. That particular provision states:

Section 6. Leaves Without Pay: Employees may take leaves of absence pursuant to the County Policy Manual and County Procedures Manual.

7. The County Policy and Procedures Manual defines any absences of longer than two weeks as a leave of absence. Section C, Subject #4, page 1 of 6 of the County Policies and Procedures Manual states in pertinent part:

A short term absence is any absence continuing two weeks or less. Absences longer than two weeks must be converted to a Leave of Absence if employment rights are to be maintained.

8. Section C, Subject #4 also notes that "If an unusual situation arises which is not covered by the following guidelines, or if special consideration is deemed appropriate, the Department head should consult with the County Commissioners." That section then goes on to discuss various types of leave and their impact on eligibility for benefits.

9. On March 22, 2006, the county commissioners responded to Lt. Eades' request in a letter to Sheriff Killham indicating that they were denying Eades' request. In explaining their rationale for denying the request, the commissioners noted that there was no personnel policy in place which allowed such a leave of absence. The commissioners alluded to concerns about setting precedent if they agreed to permit Eades his requested leave of absence. The commissioners further informed the sheriff and Eades that if Eades left his position to take the job in Afghanistan, his conduct would be considered to be a voluntary termination of his employment.

10. On March 23, 2006, Richard Letang, MPEA representative, responded to the commissioners' denial by explaining that Eades would need an extended leave of absence. Letang acknowledged the commissioners' concerns in granting an extended leave of absence because there was no specific policy covering such leave of absence. Exhibit F.

11. On March 28, 2006, the commissioners responded to Letang's March 23 letter by informing Letang that "the board of Fergus County Commissioners stands by their decision to deny Lt. Eades request for leave of absence." Exhibit G.

12. On April 4, 2006, Sheriff Killham offered a further response to the commissioners' March 22, 2006 denial of Lt. Eades' request for leave of absence. Killham indicated that when Eades had first approached him about the extended leave of absence, Killham agreed with the idea and told him to make the request of the county commissioners. Killham then went on to agree that the County Management Policy Manual did not define a leave of absence. He then included a draft "letter of agreement" that he wanted the county commissioners to agree to which would permit Lt. Eades to take his one year leave of absence without pay or accrual of benefits and yet not create any precedent that might saddle the commissioners in future requests

for leave from other employees. Killham concluded his letter by asking the commissioners to reconsider Lt. Eades' request.

13. On April 13, 2006, the commissioners considered Eades' and Killham's April 4, 2006 request. In a letter dated April 14, 2006, the commissioners refused to sign the agreement, citing concerns that they had previously raised with Eades' initial request. The commissioners also reiterated that if Lt. Eades left his job for the position in Afghanistan, the commissioners would consider it to be a voluntary termination of employment.

14. On Monday, April 17, 2006, Eades sent an e-mail to Letang indicating that in light of the commissioners' decision, he wished to file a grievance "in accordance with Fergus County policy and the Union contract." Exhibit K.

15. Eades dropped off a copy of his e-mail complaint to Letang to the sheriff's office on April 17, 2006. Testimony of Vicki Eades. Lt. Eades left for Afghanistan on April 18, 2006. The commissioners were aware that Eades was leaving on April 18.

16. On April 28, 2006, in a letter to Sheriff Killham, Vaughn sustained Eades' grievance and approved Eades' requested leave of absence. Vaughn did not provide the commission with a copy of his letter to Killham.

17. Because Eades had left for the private security job, the commissioners, consistent with their earlier stated intentions, treated Eades' conduct as a voluntary termination of his employment. On May 5, 2006, the county forwarded a letter to Eades noting that Eades had terminated his employment. The letter also contained a final payout check to Eades for accrued vacation and sick time. At the time of taking this action, the commissioners had not been apprised of the undersheriff's determination and were not otherwise aware that Eades' grievance had been sustained. In fact, the commissioners did not learn until the middle of May 2006 that Eades' grievance had been sustained by the undersheriff.

18. On May 8, 2006, Mrs. Eades cashed Lt. Eades' final check. Approximately one week after Mrs. Eades cashed the check, the commissioners first learned that the undersheriff had sustained Eades' grievance.

19. On May 15, 2006, Letang informed the county commissioners by letter that he felt they had committed an unfair labor practice by cashing out Eades' benefits and treating him as having voluntarily terminated even though the undersheriff had upheld Eades' grievance. Exhibit N. Letang advised the commissioners that he would be filing an unfair labor practice charge against the commissioners unless they agreed to adhere to the results of the grievance.

20. The commissioners never rescinded their decision to ignore the undersheriff's decision nor did the commissioners respond to Letang's May 15, 2006 letter. On June 22, 2006, having received no response from the county with respect to his May 15, 2006 letter, Letang filed this unfair labor practice charge.

21. Lt. Eades' leave of absence due to his work in Afghanistan ended on May 31, 2007. As of that date, he was back in the state of Montana and able to resume his duties as a Fergus County deputy sheriff.

IV. DISCUSSION¹

The union contends that the county has both interfered with organization rights and discriminated against a union member in conditions of employment by failing to honor the result of a grievance in which the union member prevailed. The county contends that the union member's grievance was untimely and that in any event, there was no justiciable grievance because the subject matter of the dispute was not something that could be grieved under the collective bargaining agreement.

Boiled to its essence, this case involves a power struggle between two branches of management in Fergus County, the commissioners and the sheriff's office, with a union member being caught in the middle of the fight. The unfair labor practice lies not in the county commissioners' determination that there is no such thing as an extended leave of absence, but in the commissioners' failure to abide by the grievance procedure to which they agreed in the collective bargaining agreement. For the reasons stated below, the hearing officer finds that the grievance was timely filed and that the commissioners violated Montana Code Annotated § 39-31-401(1). Because the action was not borne of anti-union animus, however, there has been no violation of Montana Code Annotated § 39-31-401(3).

A. *The grievance was timely.*

The employer argues that the grievance in this matter was untimely because the board's decision to deny Eades' request occurred on March 22, 2006. The hearing officer does not agree. The facts of this case show that the county last denied the request on April 14, 2006. It was from this denial that Eades appealed. His appeal, delivered to the undersheriff on April 17, 2007, was timely.

The collective bargaining agreement requires an aggrieved party to file a grievance "within ten (10) working days of the event giving rise to the grievance." The question here, then, is what is the event that gave rise to the grievance. While it is true that the commissioners on March 22, 2006 stated that they would not agree to the leave, that was not the commissioners' last word on the subject. After that initial rejection, Letang submitted a letter to the commissioners seeking some type of resolution to the apparent impasse. On April 4, 2006, Sheriff Killham and Lt. Eades submitted an additional request with a draft proposal letter (Exhibit J, pages 2, 3, and 4) which explained Killham's rationale for granting the leave. The commissioners then considered it at their meeting on April 13, 2006 (as demonstrated by the notes taken of the meeting). The commissioners then reaffirmed their decision. It was from this action that Eades filed his grievance.

¹Statements of fact in this discussion are incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

Under the facts as adduced at hearing, it appears from the give and take of both sides that the commissioners were in the process of evaluating the request from March 22 until April 14, 2006. It thus appears that the April 14, 2006 decision was the event giving rise to the grievance, making the grievance timely.

Moreover, even if the March 22, 2006 decision were grievable, it does not change the fact that the April 14, 2006 action was in itself a grievable event. The commissioners took action on April 14, 2006 that aggrieved Eades. Eades provided a copy of the e-mail containing his grievance to both Letang and the undersheriff who received the grievance on April 17, 2006. Eades had the right to grieve the April 14, 2006 action. Nothing in the language of the CBA precluded Eades from grieving the April 14, 2006 decision. His grievance filed on April 17, 2006 was a timely grievance of the April 14, 2006 event which satisfies the requirements of the CBA.

Finally, it is apparent from the result of the grievance that the sheriff's office, the entity charged with determining in the first instance whether the grievance was timely, in fact found it to be timely. By ruling in favor of Eades, the sheriff's office necessarily concluded that Eades' grievance was timely. Because this was a decision made by the management entity charged with making the decision, the hearing officer sees no call to override that determination. The hearing officer thus finds the grievance to be timely.

B. Interfering with the grievance determination by the undersheriff constitutes an unfair labor practice under Montana Code Annotated § 39-31-401(1).

The Montana Supreme Court has approved the practice of the Board of Personnel Appeals of using federal court and National Labor Relations Board (NLRB) precedents as guidance in interpreting the Montana collective bargaining laws. *State ex rel. Board of Personnel Appeals v. District Court* (1979), 183 Mont. 223, 598 P.2d 1117; *City of Great Falls v. Young (Young III)* (1984), 211 Mont. 13, 686 P.2d 185.

By statute, public employees are protected in the exercise of concerted activities for the purpose of collective bargaining. Mont. Code Ann. § 39-31-201. A public employer commits an unfair labor practice by interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Montana Code Annotated § 39-31-201. Mont. Code Ann. § 39-31-401(1). A public employer also commits an unfair labor practice when it discriminates in regard to hire, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization. Mont. Code Ann. § 39-31-401(3). Proof of discriminatory animus toward the union or union activity is not necessary in order to prove a violation of Montana Code Annotated § 39-31-401(1). Proof of discriminatory animus is necessary in order to prove a violation of Montana Code Annotated § 39-31-401(3). *Young v. City of Great Falls* (1982), 198 Mont. 349, 355, 646 P.2d 512, 515.

The NLRB has ruled that an individual employee's attempt to enforce the provisions of an existing collective bargaining agreement is concerted activity protected by 29 USC §157 of the National Labor Relations Act (the federal counterpart to Montana Code Annotated § 39-31-201). *The Developing Labor Law*, p. 199, Ch. 6, III, A 1 (5th Ed. 2006). As this authority

recognizes, "Individual action taken to implement a collective bargaining agreement is 'but an extension of the concerted activity giving rise to the agreement.'" *Id.*, citing *Bunney Bros. Construction Co.*, 139 NLRB 1516 (1962). See also, *Interboro Contractors, Inc.*, 157 NLRB 1295 (1966). Moreover, the United States Supreme Court has recognized that an employee's invocation of a perceived right under the collective bargaining agreement is considered concerted activity regardless of whether the employee turned out to have been correct in his belief that the right is protected. *NLRB v. City Disposal Systems*, 465 U.S. 822, 840 (1984); *NLRB v. Ford Motor Company*, 683 F.2d 156, 169 (6th Cir. 1982).

In this case, then, Eades' conduct in filing the grievance is concerted activity. Filing the grievance is protected activity under Mont. Code Ann. §§ 39-31-201 and 39-31-401(1) if this conduct is permitted by the CBA. This determination must be made by looking at the language of the CBA.

The CBA delegates the power to adjudicate a grievance first to the undersheriff and then to the sheriff. Article VIII, Section 6. The collective bargaining agreement defines a grievance as "an **alleged** violation, misinterpretation, or misapplication of **any provision of this Agreement** (emphasis added)." There is no requirement under this provision that an actual violation, misinterpretation or misapplication exist in order to permit an employee to pursue a grievance. All that is required is that there be an alleged violation, misapplication or misinterpretation of a provision of the agreement in order for the grievance remedy to be available. Article IX, Section 6 specifically mentions "leaves without pay" as a subject of the collective bargaining agreement but then indicates that "employees may take leaves of absence pursuant to the County Policy Manual"

At a minimum, the collective bargaining agreement, by its reference to "leaves without pay," suggests that there is a type of leave available under the collective bargaining agreement known as "leave without pay." Whether this would ultimately prove correct after reviewing the County Policy Manual is of no consequence since by discussing the term "leaves without pay," the collective bargaining agreement **itself** has created a situation whereby an employee who challenges the denial of such leave has **alleged** a violation of a provision of the agreement. This is wholly consonant with the requirements for bringing a grievance under Article VIII, section 4 of the CBA.

The commissioners argue that because the collective bargaining agreement refers back to the County Policy Manual, and there is no leave of absence such as that sought by Eades in the policy manual, there is no right under the collective bargaining agreement and, therefore, there is no right to pursue a grievance under the collective bargaining agreement. This rationale essentially ignores the presence of the word "alleged" in the definition of those things which may be grieved under the collective bargaining agreement. While it might ultimately have proved true that there was no type of leave to which Eades was entitled, this does not lessen the force of the fact that he brought a grievance alleging that a right under the bargaining agreement had been violated, namely a leave of absence without pay. His right to have his issue adjudicated through a grievance under the collective bargaining agreement is manifest given the language of the agreement.

Of equal if not greater importance than the contractual issues in this case are the detrimental implications for labor relations that would ensue if the Board permitted the commissioners to ignore the outcome of the grievance. The primary purpose of the public employer labor relations statutes is "to encourage the practice and procedure of collective bargaining to arrive at a friendly adjustment of all disputes between public employers and their employees." Mont. Code Ann. § 39-31-101. That policy was satisfied in the process whereby Eades timely filed a grievance and had it adjusted by the management entity charged with the responsibility of doing so. The commissioners, unhappy that another branch of management to which they delegated the authority to decide grievances found that Eades was entitled to the leave he sought, has now ignored the result for which it bargained. To permit the county to ostensibly do an end run around the collectively bargained grievance procedure is to introduce the very strife that the statutes are designed to prevent.

To hold that the commissioners violated the collective bargaining agreement by ignoring the results of the grievance does nothing to diminish any statutory or charter rights that the commissioners might otherwise have to manage their employees. In this case, the commissioners have incurred no loss of control because a branch of **management** to which the commissioners delegated control has rendered the decision. If the commissioners have a problem with the conduct of the sheriff's office in this case, their remedy is to negotiate a different collective bargaining agreement or take some other type of action against the sheriff's office. The remedy is not to permit the commissioners to ignore the grievance result and thereby vent their displeasure with the sheriff's office on an employee who has acted reasonably to protect his collective bargaining rights. By ignoring the result of the grievance in this case, the commissioners have violated Montana Code Annotated § 39-31-401(1).

C. There has been no violation of Montana Code Annotated § 39-31-401(3).

As previously indicated, to prove a violation of Montana Code Annotated § 39-31-401(3), the union must prove that the commissioners' action was motivated by anti-union animus. The union must first show that the protected activity is a substantial or motivating factor in the determination to take action against the employee. If the union can do this, the burden then shifts to the employer to show that it would have carried out the decision even without the employee having engaged in the protected activity. *Chauffeurs, Teamsters and Helpers, Local 190 v. City of Billings*, (1982), 199 Mont. 302, 313-14, 648 P.2d 1169, 1175.

The union maintains that Eades was fired in "retaliation for the exercise of his rights under the law and CBA." Complainant's Opening Brief, page 3. However, because of the timing of the commissioners' threat to consider Eades to have self terminated if he left for Afghanistan, their action cannot be considered to have been taken in retaliation for any protected conduct. On March 23, 2006, just one day after receiving Eades' initial request (right out of the chute, so to speak), the commissioners informed Eades that if he left his job with the county, they would consider him to have voluntarily terminated his employment. Consistent with their original statement, when Eades left for Afghanistan, the commissioners considered him to have voluntarily terminated his position. The commissioners were unaware at the time that Eades' grievance had been sustained by the undersheriff. Because the commissioners settled on their course of action long before they knew that Eades would be exercising any rights

under the collective bargaining agreement, no anti-union animus can be proven in this case such that a violation of the statute can be found to exist.

D. The remedy for the violation.

Upon determining by a preponderance of the evidence that an unfair labor practice has occurred, the Board of Personnel Appeals shall issue and serve an order requiring the entity named in the complaint to cease and desist from the unfair labor practice. Mont. Code Ann. § 39-31-406(4). The Board shall further require the offending entity to take such affirmative action, which may include restoration to the *status quo ante*, “as will effectuate the policies of the chapter.” *Id.* See also, *Keeler Die Cast* (1999), 327 NLRB 585, 590-91; *Los Angeles Daily News* (1994), 315 NLRB 1236, 1241.

The union has indicated that it seeks no remedy other than to have the commissioners adhere to the grievance result. Under the circumstances of this case, that remedy is appropriate. Since Lt. Eades’ leave of absence has already been completed and he is now back in Montana, he should be reinstated into his position in conformity with the grievance resolution ordered by the undersheriff.

V. CONCLUSIONS OF LAW

1. The Board of Personnel Appeals has jurisdiction in this matter pursuant to Mont. Code Ann. § 39-31-405.

2. The Union has demonstrated by a preponderance of the evidence that the commissioners’ refusal to honor the result of the grievance procedure violated the collective bargaining agreement and violated Montana Code Annotated § 39-31-401(1).

3. The union has failed to show that the commissioners’ conduct was discriminatory toward the union. Therefore, the union has failed to prove a violation of Montana Code Annotated § 39-31-401(3).

4. Imposition of an order requiring the commissioners to adhere to the grievance as determined by the undersheriff is appropriate. At this point, it would include reinstating Lt. Eades into his job as a deputy county sheriff effective as of the date of his return from his leave of absence, May 31, 2007, and providing him all benefits and salary he would otherwise have accrued after May 31, 2007 had he been reinstated in his position on that date, less an offset for any salary he has earned since that time in any other job he might have taken.

VI. RECOMMENDED ORDER

Fergus County is hereby ORDERED:

1. To cease and desist from engaging in the unfair labor practice in this case by implementing the results of Lt. Eades’ grievance in accordance with the April 28, 2006 determination of Fergus County Undersheriff Vaughn;

2. To reinstate Lt. Eades as a deputy county sheriff effective May 31, 2007; and

3. To pay Lt. Eade all benefits and salary he would have accrued after May 31, 2007 had he been reinstated in his position on that date, less an offset for any salary he has otherwise earned in any other job he might have taken since May 31, 2007.

DATED this 23rd day of October, 2007.

BOARD OF PERSONNEL APPEALS

By: /s/ GREGORY L. HANCHETT
GREGORY L. HANCHETT
Hearing Officer

NOTICE: Exceptions to these Findings of Fact, Conclusions of Law and Recommended Order may be filed pursuant to Admin. R. Mont. 24.26.215 within twenty (20) days after the day the decision of the hearing officer is mailed, as set forth in the certificate of service below. If no exceptions are timely filed, this Recommended Order shall become the Final Order of the Board of Personnel Appeals. Mont. Code Ann. § 39-31-406(6). Notice of Exceptions must be in writing, setting forth with specificity the errors asserted in the proposed decision and the issues raised by the exceptions, and shall be mailed to:

Board of Personnel Appeals
Department of Labor and Industry
P.O. Box 6518
Helena, MT 59624-6518